IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, et al.
KHAN MATIN, M.D., et al.,

Petitioners,

v. **No. 08-1885**

THE HONORABLE LOUIS BLOOM, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, and E.H. et al.,

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

The West Virginia Department of Health and Human Resources (the Department) petitions this Court to issue an Order to Show Cause why a Writ of Prohibition should not be granted in this case. The Department objects to the Circuit Court of Kanawha County's reopening of E.H. v. Matin, No. 81-MISC-585, to hold an evidentiary hearing about the Department's violations of section 27-5-9 of the West Virginia Code. The court was alerted to the Department's failure to provide humane conditions and treatment to mentally ill patients by the Ombudsman for Behavioral Health, employed by the Department. Specifically, the court requested evidence regarding (1) severe overcrowding at Mildred Mitchell-Bateman Hospital (Bateman Hospital) resulting in several violations of patients' rights under section 27-5-9 and (2) the Department's failure to comply with a mediated consent order requiring provision of services to individuals with traumatic brain injuries (TBI) in accordance with section 27-5-9.

As explained below, the circuit court's order falls well within its powers to ensure that state agencies comply with legislative mandates. Because the order does not violate the law, this Court

should deny the Department's request for an Order to Show Cause.

I.FACTS

A. Court Monitoring in E.H. v. Matin

This action was originally filed by the plaintiffs below in response to egregious violations of section 27-5-9 of the West Virginia Code, including overcrowding at Bateman Hospital (Huntington Hospital by statute, W. Va. Code § 27-2-1), the same issue raised in the current proceeding. In E.H. v. Matin (E.H. I), 284 S.E.2d 232 (W. Va. 1981), the West Virginia Supreme Court of Appeals held that section 27-5-9 grants hospitalized mentally ill people the right to humane custody and treatment. Id. at 237. By creating these rights, the Court held, the legislature had created a duty for the Department to enforce these rights. Id. If the Department failed to enforce patient rights, they could be enforced through the courts. Id. The Court directed the circuit court to supervise the development and institution of a plan to bring the state's mental hospitals into full compliance with the statute. Id. at 239-41. The Court left the particulars of the plan to the circuit court and the parties, but also stated the following specific issues that the court should ensure were addressed: maximization of efficiency of health care delivery; the level of resources to be expended on various types of patients; staff training; and patient to staff ratios. Id.

In November 1983 the court adopted the final plan, which was developed by the Department. See E.H. v. Matin (E.H. II), 428 S.E.2d 523, 525 (W. Va. 1993). The plan was to be implemented by the Department with oversight by the court and a court monitor. For the next ten years the plan was implemented with no significant litigation. In 1993, however, the Department appealed a ruling by the circuit court halting construction of a hospital. E.H. II, 428 S.E.2d 523. In E.H. II, this Court held that the circuit court did not have the authority to halt the construction of a hospital when the

legislature had already explicitly appropriated funds for the hospital's construction. 428 S.E.2d at 526. The Court requested further briefing, however, on the need for continued monitoring of the Department's delivery of services by the circuit court. Id. at 528. After consideration of the arguments of both parties, the Court held that continued court monitoring of the agency was necessary, given the obligations imposed on the Department by statute, the Department's failure to meet those obligations, and that the court monitor assisted with efficient resolution of disputes. E.H. v. Matin (E.H. III), 432 S.E.2d 207, 208 (W. Va. 1993).

Court monitoring continued until 2002 to ensure the Department's compliance with its statutory duties. Thereafter, in an order dated March 27, 2002, the court dissolved the office of the court monitor and removed the case from the active docket. Order, E.H. v. Matin, No. 81-MISC-585 (March 27, 2002) (attached at Ex.1). At the request of the Secretary of the Department, Paul Nussbaum, an Office of the Ombudsman was created within the Department to assist with continued compliance. Id. In removing the case from its active docket, the court stated that it would only consider "[m]ajor questions of non-implementation involving . . . eight unresolved issues" identified in the order, and that it would only consider these "after submission to the Ombudsman process." Id. These outstanding issues included case management services and services for victims of traumatic brain injury. Id.

B. The Ombudsman for Behavioral Health, Department of Health and Human Resources

In 2002 the Ombudsman for Behavioral Health was developed by then-Secretary of the Department, Paul Nussbaum. Nussbaum requested that the Ombudsman be created because he believed the office was necessary and useful to the Department as an ongoing mechanism for

internally and informally resolving compliance concerns without resort to litigation. Individuals with individual or systemic grievances regarding the delivery of services are encouraged to submit their complaints to the Ombudsman. See W. Va. Dep't of Health & Human Res., Ombudsman for Behavioral Health (attached at Ex. 2). The Ombudsman then attempts to resolve these complaints by facilitating communication between agencies and through the use of mediation. See id. The Ombudsman compiles regular reports of grievances, monitors compliance with E.H. v. Matin, and was to meet regularly with Department officials to resolve concerns and avoid litigation. The Ombudsman is physically located within the Department and is a state employee.

From 2002 to 2004, the Ombudsman met regularly with Nussbuam and other senior members of the Department to resolve service delivery issues. The amount of litigation in E.H. v. Matin and other lawsuits against the Department regarding the provision of mental health services declined dramatically, because service delivery issues were being resolved informally. This arrangement was efficient for the Department, as it avoided both the costs of litigation and the potential of actual and punitive damage awards in individual or class actions. The arrangement also benefitted recipients of services who, with the help of the Ombudsman, could obtain the services they needed without taking on the cost, disruption, or delay of litigation.

From 2003 through 2008, the Ombudsman submitted regular reports to the court and the Department regarding complaints, resolution, and progress on the eight items listed in the court's 2002 Order. See, e.g., Ombudsman for Behavioral Health, Annual Report 2007-2008 (Pet. for Writ of Prohibition, Ex. F). Accordingly, the Ombudsman issued its Annual Report for 2007-2008. Id.

C. The Current Controversy

The Ombudsman's 2007-2008 Annual Report identified three outstanding issues from the

2002 Order for resolution: case management services/ service coordination, traumatic brain injury, and forensic services. Id. In addition to identifying overcrowding as an issue in the Annual Report under the heading of case management, id., the Ombudsman also issued a report on July 3, 2008, specifically detailing severe overcrowding at Bateman Hospital and outlining recommendations for resolving this problem. Ombudsman for Behavioral Health, A Review of Over-Bedding at Mildred Mitchell-Bateman Hospital and Recommended Order (2008) [hereinafter A Review of Over-Bedding] (Pet. for Writ of Prohibition, Ex. G). The Ombudsman had previously raised this issue in a report to the Department in 2006, but had received no response from the Department. The Ombudsman offered assistance to the Department in implementing the recommendations. A Review of Over-Bedding, supra, at 10. The Department, however, responded to the Ombudsman with objections to his recommendations and a refusal to work to implement them in a letter dated August 27, 2008. Letter from Charlene A. Vaughan, Deputy Attorney Gen., to David G. Sudbeck, Ombudsman for Behavioral Health (Aug. 27, 2008) (Pet. for Writ of Prohibition, Ex. H). On August 28, 2008, the court held a routine hearing on the issues identified by the Department's Ombudsman, namely, overcrowding at Bateman and the provision of TBI services. As explained further below, the court determined that significant deficiencies in the Department's provision of services required the court to reopen of this case for the purpose of conducting an evidentiary hearing on these issues. Order, E.H. v. Matin, No. 81-MISC-585 (Pet. for Writ of Prohibition, Ex. A). This is the Order at issue.

1. Overcrowding at Bateman Hospital

In response to numerous complaints from the patients and staff of Bateman Hospital and advocate agencies from 2006 to 2008, the Ombudsman investigated reports of overcrowding at the

hospital through site visits and interviews with patients, families, and staff in the spring of 2008. As of April 2008, the Department reported that Bateman and Sharpe Hospitals were overcapacity by 151 patients. Dep't of Health & Human Res., CENSUS - Bateman and Sharpe Hospitals (2008) (attached at Ex. 3). The Ombudsman's investigation revealed that the persistent problem of overcrowding over the course of four years, had resulted in several violations of patients' rights to an adequate environment and treatment. A Review of Over-Bedding, supra, at 2-7. The environmental and safety problems included: (1) lack of availability of bathrooms, including needing to have staff unlock bathrooms before they could be used; (2) lack of privacy, including windows from hallways into makeshift rooms and inability to use privacy curtain because of the number of beds in a room; (3) lack of necessary equipment, such as wheelchairs, leading to serious hazards in case of a fire or other emergency; (4) use of cots in disrepair for beds and lack of sufficient bedding; (5) crowding resulting in insufficient pathways and fire hazards; (6) non-availability of daily showers and basic grooming; (7) no room for personal belongings; (8) inadequate seating and staff assistance at mealtime; and (8) insufficient food items. Id. Furthermore, the investigation revealed that patient care was, according to one staff person, the worst it had been in ten years, including specifically: (1) low staff morale and high tension and fatigue; (2) failure of diversionary hospitals to take aggressive patients; (3) no staff time to devote to daily living skills; (4) increase of patient to patient and patient to staff incidents, as the result of lack of staff supervision and the stress of overcrowding; (5) mixing of various patient populations with widely different treatment needs; (6) requiring staff to work two consecutive eight hour shifts and to work through necessary breaks; (7) inexperienced, unqualified, and sometimes dangerous temporary staff to supplement full time staff; and (8) loss of qualified professional staff due to the conditions at the hospital. Id.

The Ombudsman issued five recommendations to the Department for rectifying the problem, including diversion of patients to other facilities, increased coordination with diversionary hospitals, reevaluation of staffing practices, and evaluation of whether a separate facility for the forensic population is warranted. Id. at 8-9. As an employee of the Department, the Ombudsman offered assistance in implementing these recommendations. Id. The Department responded by rejecting the recommendations and stating that its current efforts were sufficient. Letter from Charlene A. Vaughan, Deputy Attorney Gen., to David G. Sudbeck, Ombudsman for Behavioral Health (Aug. 27, 2008) (Pet. for Writ of Prohibition, Ex. H). Because of the Department's refusal to work with its Ombudsman, the issue was brought before the court instead of being resolved internally. After hearing from both parties, the court concluded that an evidentiary hearing was necessary on this issue. Order, E.H. v. Matin, No. 81-MISC-585 (Pet. for Writ of Prohibition, Ex. A). This Order is the subject of this action.

2. Traumatic Brain Injury

In 1998 plaintiffs noted the lack of necessary services for individuals with TBI in West Virginia in violation of the rights to adequate and appropriate treatment provided in section 27-5-9 of the West Virginia Code. Accordingly, they submitted a request for resolution. As the court monitor's report revealed, traumatic brain injury, which is often caused by vehicle accidents, results in a long-term substantial loss of functioning. Formal Recommendations - Traumatic Brain Injury, E.H. v. Matin, No. 81-MISC-585, 4-5 (March 5, 1999) [hereinafter TBI Recommendations] (attached at Ex. 4). Because of modern technology, TBI fatalities have declined and increasing numbers of people are living with brain injuries and need long-term services. Id. at 5. TBI victims need specific services that generally do not coincide with available services for the mentally ill or

mentally retarded, and which require specialized training and techniques and individualized treatment. Id. at 7, 9. At the time of the court recommendations there was no accurate census of West Virginians with TBI; later figures estimate 2500 TBI victims reside in West Virginia. Office of the Ombudsman, Annual Report 2007-2008. Despite the pressing need, West Virginia does not provide the necessary, specialized services to TBI victims in the state. See TBI Recommendations, supra.

Several states have addressed the need for TBI services by securing funding through a Medicaid Waiver program; as of 2003, twenty-five states had such a waiver program. The waiver program can provide several important services, including a personal care assistant, day rehabilitation, emergency response systems, and family training. Id. at 8-9. West Virginia does not have a waiver program to provide TBI services, and as a result TBI victims receive few if any services in West Virginia. Id. at 12.

In preparing the report, the court monitor recognized that although West Virginia had developed various plans to provide TBI services, none had been implemented. Id. at 12. The monitor identified potential funding streams, delineated four main gaps in service, and issued formal recommendations in March 1999. Id. at 12-20.

After a court hearing and the submission of the court monitor's report and formal recommendations, the Department and the plaintiffs informally resolved the issue through mediation. The court adopted the agreement in an order issued on August 6, 2001. Order, E.H. v. Matin, No. 81-MISC-585 (Aug. 6, 2001). As noted above, the court subsequently removed this case from the active docket and dissolved the position of the court monitor, although it acknowledged that the Department needed to continue working to implement an adequate TBI program. The court thus

required the Ombudsman to report progress on this and other issues. Order, E.H. v. Matin, No. 81-MISC-585 (March 27, 2002) (attached at Ex.1).

In July 2004, the Ombudsman, at the request of the Department, facilitated the creation of a Memorandum of Understanding (MOU) between several West Virginia agencies outlining how the agencies would collaborate to ensure the provision of necessary TBI services. Paul Nussbaum, Secretary of the Department of Health and Human Resources, was a signatory to this agreement, as were officials from the Division of Rehabilitation Services in the Department of Education and the Arts, the Department of Motor Vehicles, the Public Employees Insurance Agency, the Department of Education, the TBI/SCI Rehabilitation Fund Board, and the Workers Compensation Commission. Although the MOU outlined several steps to implementing a comprehensive TBI program, Paul Nussbaum left office in 2004 and no further meetings were held under the MOU.

In July 2007, the Department, the Ombudsman, and the plaintiffs again entered into mediation to resolve the Department's failure to implement appropriate TBI services. Consent Order on Services to Individuals with Traumatic Brain Injuries, E.H. v. Matin, No. 81-MISC-585 (July 3, 2007) (Pet. for Writ of Prohibition, Ex. I). The parties, again without intervention of the court and with the assistance of a mediator, adopted an agreement outlining specific steps toward implementation of a TBI System of Care. Id. The agreement established a clear timeline for completing steps in implementation. Id. The agreement further established a TBI Oversight Group that would, among other activities, seek funding for TBI programs. Id. The court again adopted the consent order, as agreed by the parties. Id.

On May 15, 2008, the court held a routine hearing on the implementation of the TBI delivery plan, as established in the consent order. Order, E.H. v. Matin, No. 81-MISC-585 (June 30, 2008)

(Pet. for Writ of Prohibition, Ex. J). After hearing from the parties, the court found that the Department had made insufficient progress toward implementing TBI services, as required by the consent order, and noted the possibility of reopening the matter for evidentiary hearings. Id. After another hearing on August 28, 2008, the court ordered that the case be reopened. Order, E.H. v. Matin, No. 81-MISC-585 (Pet. for Writ of Prohibition, Ex. A). This Order is the subject of these proceedings.

II. DISCUSSION

Petitioner alleges that this Court should issue a Writ of Prohibition against the circuit court below for three reasons. As explained below, each of these arguments has long been rejected by this Court. Accordingly, this Court should not issue an Order to Show Cause in this case.

A. Standard for Granting a Writ of Prohibition

The Department applies for a Writ of Prohibition alleging that the circuit court exceeded its legitimate powers. This Court thus must

> examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

State ex rel. Tucker Co. Solid Waste Auth. v. W. Va. Div. of Labor, ___ S.E.2d ___, 2008 WL 2523591 (W. Va. 2008) (internal quotation marks omitted). "Substantial weight" should be given to the third factor, and the writ should only be granted where "substantial, clear-cut, legal errors plainly in contravention to [the law] which may be resolved independently of any disputed facts." Id. (internal quotation marks omitted). The writ of prohibition should be granted extremely rarely,

as it is "a drastic and extraordinary remedy." Id.

In issuing an order for an evidentiary hearing for the purpose of considering statutory violations by a state agency, the circuit court in this case did not undertake any extraordinary action in clear violation of the law. The Court should thus not issue an Order to Show Cause in this matter.

B. Holding an Evidentiary Hearing on Overcrowding and TBI Is Within the Circuit Court's Authority.

The Department first argues that the circuit court has exceeded the authority previously granted to it by the Supreme Court in this case. The Department claims that the conditions originally warranting court supervision have ceased, and that, as a result, the case should not be reopened to consider its current violations. The Department's assertions have no basis in either law or fact.

This Court has repeatedly held that the Department has the duty to provide "humane conditions of confinement and effective therapeutic treatment" to individuals in mental health hospitals under West Virginia Code section 27-5-9. E.H. I, 284 S.E.2d at 237; see also E.H. II, 428 S.E.2d at 524-25 & n.1; E.H. III, 432 S.E.2d at 208-09 ("[T]he law poses an obligation on the State to provide adequate and competent health care to meet the needs of the mentally ill in West Virginia."). When the Department fails in this duty, it is appropriate, and indeed necessary, for the courts to ensure that the agency complies with its legislative mandate. See E.H. I, 284 S.E.2d at 237; E.H. II, 428 S.E.2d at 524-25 & n.1; E.H. III, 432 S.E.2d at 208-09.

This Court ordered that the circuit court supervise "the development of an appropriate plan for the entire reorganization of the mental health care delivery system in West Virginia" in response to the woefully inadequate conditions at Bateman Hospital (then Huntington State Hospital) due to the Department's failure to comply with its statutory duty. E.H. I, 284 S.E.2d at 237. In 1993, after

careful consideration of the steps taken by the Department, this Court recognized that the Department continued to violate the law, and the Court ordered that court monitoring was still warranted at that time. E.H. III, 432 S.E.2d at 208-09. In originally ordering court supervision, this Court specifically recounted the failures of the Department to provide sufficient qualified staff, training, coordination, or a humane environment to patients. E.H. I, 284 S.E.2d at 235-36.

Despite the Department's insistence to the contrary, the circuit court wishes to reopen this case for an evidentiary hearing to examine the exact same issues that originally prompted this lawsuit–insufficiently qualified or trained staff, overcrowding, improper treatment, inhumane environment, and lack of coordination of treatment.[1] Like the conditions that originally concerned this Court, the Ombudsman–the Department's own employee–has brought to the court's attention inhumane conditions of confinement and a systemic failure of treatment for certain patients. Specifically, the Ombudsman has consistently noted the continuation of overcrowding at the state's mental hospitals. As a corollary to the overcrowding, the Ombudsman has noted that there are insufficient trained staff to provide safe and humane conditions and to provide appropriate treatment to patients.

The overbedding crisis at Bateman Hospital has resulted in a myriad of violations of section 27-5-9 and the regulations promulgated pursuant to that statute. For instance, the use of untrained temporary staff and inadequate numbers of trained staff has resulted in a violation of the patients' rights to "[t]reatment by trained personnel" and "[t]reatment based on appropriate examination and

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[1]Also contrary to the Department's assertions, the circuit court has not monitored the Department since 1981. Instead, the court removed this case from the active docket under assurances from the Department that it would correct specific outstanding violations. Order, E.H. v. Matin, No. 81-MISC-585 (March 27, 2002) (attached at Ex.1). It is only because the Department has failed to meet its obligations that the court has been forced to reopen this case.

diagnosis by a staff member operating within the scope of his professional license." W. Va. Code § 27-5-9(c)(1), (4); see W. Va. Code R. § 64-59-6. The overcrowding of bedrooms and failure to provide unlocked access to bathrooms violates patients' rights to privacy. See W. Va. Code R. § 64-59-5.7. Patients are also being denied their right to access their personal belongings and clothing. See W. Va. Code R. § 64-59-13. The lack of sufficient seating, multiple patients to a room, inadequate bedding and storage, and inadequate bathroom access each violate specific provisions of the regulations. See W. Va. Code R. § 64-59-15. These are only examples; the conditions at Bateman Hospital–like the conditions at the origination of this case–violate dozens of provisions of the West Virginia State Rules, promulgated under section 27-5-9 of the West Virginia Code. W. Va. Code § 27-5-9(g).

Similarly, as described above, the Department's failure to provide appropriate treatment to TBI victims has long been a part of this litigation and clearly falls within the scope of this Court's order that the circuit court ensure that the Department comply with the treatment requirements in section 27-5-9. See E.H. I, 284 S.E.2d at 237. Furthermore, the circuit court's order to reopen this case for an evidentiary hearing on TBI programs is predicated on a mediated agreement with the Department. The circuit court has clear authority to enforce this agreement. See Seal v. Gwinn, 191 S.E. 860, 862 (W. Va. 1937).

The Department's sole support for its argument is a citation to Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991). This case is inapposite. Dowell concerns the standard for adjudicating a motion to terminate an injunction entered to remedy past violations of the Fourteenth Amendment to the U.S. Constitution. This standard has never been applied to the enforcement of West Virginia state law by the West Virginia courts. Additionally, the

Fourth Circuit has explained that Dowell's application even to federal cases involving consent decrees (such as the TBI consent orders here) and orders to ensure prospective compliance with federal law is limited. See Alexander v. Britt, 89 F.3d 194, 197-99 (4th Cir. 1996). Furthermore, even if the Dowell standard did apply to mandamus actions to enforce state law (which would be a significant departure), the Department should have moved in circuit court for relief from judgment for the standard to apply in this case. In any event, the Department would not qualify under the Dowell standard for relief, as it has not complied in good faith with the court order for a reasonable period of time, nor have the vestiges of past violations been eliminated. See Dowell, 498 U.S. at 249-50; Alexander, 89 F.3d at 202 (denying motion to terminate consent decree in part because "[a] party seeking to terminate a decree must demonstrate 'compliance with it.'" (citing Dowell, 498 U.S. at 248-51)).

Again, despite the Department's insistence to the contrary, the violations at issue here are the exact same statutory violations that prompted this Court to direct supervision of the Department throughout this litigation. The circuit court's order for an evidentiary hearing is well within the authority granted to it by this Court to enforce patients' statutory rights. Moreover, the evidentiary hearing is by far the most efficient and appropriate method of resolving the Department's statutory violations. The alternative to resolving this dispute in this mandamus action would be a myriad of individual or class suits against the Department for its failure to provide humane conditions and appropriate treatment under section 27-5-9. These new suits would result in increased litigation costs and the likelihood of damages for the Department rather than simple, expeditious remediation of the deplorable conditions at Bateman Hospital and the provision of appropriate treatment. This simply cannot be the preferred or appropriate method of resolution.

In sum, the circuit court has not exceeded its authority or committed a clear error of law in ordering an evidentiary hearing on overcrowding at Bateman Hospital and TBI services. Thus, a Writ of Prohibition cannot issue on this ground.

C. The Circuit Court's Enforcement of Legislation Does Not Encroach on the Rights of the Executive Branch.

The Department next argues that the circuit court exceeded its authority under article 5, section 1 of the West Virginia Constitution by ordering an evidentiary hearing on the Department's statutory violations. The Department relies on an out-of-context quote from E.H. II as its sole support for this far-fetched argument.

E.H. II concerned a circuit court order halting construction of a new hospital. 428 S.E.2d at 525-26. Before the court entered its order, the plaintiffs had agreed that construction was appropriate and the legislature had appropriated funds specifically for this project. Id. at 525. This Court held that the circuit court had exceeded its authority because "the legislature, through the budget process, expressly provide[d] for funding to build a new public facility" and "the courts [were] not authorized to interfere with the legislative mandate." Id. at 526. The Court further held that the plaintiffs were estopped from arguing that construction should be halted after they had expressly agreed to that construction. Id. at 527. E.H. II thus only stands for the propositions that (1) courts cannot order a stop to construction of a building that has been financed by the legislature, unless that financing does not rest on a rational basis; and (2) parties cannot advocate inconsistent positions in litigation. Neither of these rules have any bearing on whether the court's order to hold an evidentiary hearing on a statutory violation infringes on the rights of the executive branch.

Indeed, the E.H. decisions clearly support the opposite position. This Court has consistently

rejected the very same argument that the Department appears to advocate here: that it is unconstitutional for the courts to enforce legislative mandates on state agencies. In the very case quoted by the Department, this Court withheld judgment on the propriety of continued court monitoring of the Department's obligations under section 27-5-9. E.H. II, 428 S.E.2d at 528. The Court subsequently held that court monitoring was appropriate, given the Department's failure to meet its "obligation . . . to provide adequate and competent health care to meet the needs of the mentally ill in West Virginia." E.H. III, 432 S.E.2d at 446.

As explained above, the circuit court's order at issue here seeks to address the same statutory violations that this Court has repeatedly held should be addressed through court oversight. As the Court had held,

> [Section] 27-5-9 creates a duty on the part of the State to enforce the petitioner's rights under the statute. . . . [T]his duty is enforceable in an action in mandamus. To hold otherwise would be to imply that the Legislature passed this statute merely to serve as a hortatory expression of its wishes. We are loath to draw such a conclusion.

E.H. I, 284 S.E.2d at 258. The Department has violated section 27-5-9 by creating conditions of severe overcrowding in Bateman Hospital leading to the deprivation of numerous patient rights, and by failing to provide necessary treatment and care to victims of TBI. The Department's claim of "budgetary constraints" (Mem. in Supp. of Pet. for Writ of Prohibition 16) cannot negate its responsibility to comply with the statute; this Court has repeatedly held that "[i]t is the obligation of the State to provide the resources necessary to accord inmates of mental institutions the rights which the State has granted them under W. Va. Code [§] 27-5-9." E.H. I, 284 S.E.2d at 238; see E.H. III, 432 S.E.2d at 208.

The circuit court wishes to reopen the case to ensure that the Department meets its statutory

duties. In contrast to the Department's claims, the court has repeatedly deferred to the Department by allowing it to craft its own plans for the appropriate provision of services. See E.H. II, 428 S.E.2d at 525 (describing the Department's development of the original plan); Consent Order on Services to Individuals with Traumatic Brain Injuries, E.H. v. Matin, No. 81-MISC-585 (July 3, 2007) (Pet. for Writ of Prohibition, Ex. I). Such deference to the executive "to formulate an adequate proposal to rectify . . . deplorable conditions" is appropriate. Crain v. Bordenkircher, 382 S.E.2d 68, 70 (W. Va. 1989). It remains the court's responsibility, however, to ensure that remedial plans are indeed "adequate" and that the Department properly implements them so that it can reach compliance with the law. See E.H. I, 284 S.E.2d at 239. In other words, it is not within the executive's discretion to violate the law; at that point, the courts may intervene. See State ex rel. Steele v. Kopp, 305 S.E.2d 285, 292 (W. Va. 1983). Thus, it is well within the circuit court's powers as explained by this Court to hold an evidentiary hearing on the Department's failures to comply with its own plan to reach statutory compliance. Because the court's decision to do so does not exceed its powers or result in a violation of law, a Writ of Prohibition can not issue.

D. The Circuit Court's Enforcement of Legislation, By Requiring the Department of Behavioral Health to Comply with Its Agreement to Provide TBI Services, Does Not Encroach on the Rights of the Legislative Branch.

The Department finally argues that the circuit court, by attempting to enforce a consent order ensuring the provision of TBI services, has encroached on the legislative branch . The Department's argument consists of a convoluted series of citations to undisputed principles of constitutional law; the Department fails to coherently explain, however, how the circuit court's order violates any of

these principles.[2]

First, the Department asserts that the court has no power to order the evidentiary hearing because, it claims, there is no violation of law. (Mem. in Supp. of Pet. for Writ of Prohibition 18-19.) This is simply not the case. As the Department correctly recognizes, it is the role of the judiciary to ensure that the law is followed and upheld. See E.H. I, 284 S.E.2d at 258; see also Randolph Co. Bd. of Educ. v. Adams, 467 S.E.2d 150, 165 (W. Va. 1995); State v. Huber, 40 S.E.2d 11, 25 (W. Va. 1946) (holding that judicial power is appropriately exercised where "there is a violation of the Constitution, or the laws of the State"). Here, as throughout this litigation, the Department has violated section 27-5-9 by failing to provide adequate services to victims of TBI. Accordingly, the court has a right to exercise its power to enforce the law, which was duly enacted by the legislature. By doing so, the court does not encroach on the rights of the legislature; to the contrary, the court upholds the rights of the legislature by ensuring that the laws enacted by the

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[2] Other than standing for the general proposition that the constitution provides for a separation of powers–a proposition that no party disputes–the cases cited by the Department are entirely inapposite. The vast majority of the cited cases concern whether a statute enacted by the legislature is constitutional. See Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 42 (1933) (statute granting a taxation exemption is constitutional); Bibb v. Navajo Frieght Lines, Inc., 359 U.S. 520 (1959) (statute regarding truck mudguards is unconstitutional); Blankenship v. Richardson, 474 S.E.2d 906 (W. Va. 1996) (workers' compensation statute is constitutional); State ex rel. Meadows v. Hechler, 462 S.E.2d 586 (W. Va. 1995) (statute usurping executive authority is unconstitutional); Application of Dailey, 465 S.E.2d 601 (W. Va. 1995) (statute delegating legislative authority to the courts is unconstitutional); Boyd v. Merritt, 354 S.E.2d 106, 108 (W. Va. 1986) (workers' compensation legislative rule is valid); State v. Huber, 40 S.E.2d 11 (W. Va. 1946) (statute delegating legislative authority to the courts is unconstitutional); Sims v. Fisher, 25 S.E.2d 216, 222 (W. Va. 1943) (same); Hodges v. Public Serv. Comm'n, 159 S.E. 834 (W. Va. 1931) (same). These cases clearly do not apply here, where no legislative enactment has been challenged at any point. The remaining cases cited by the Department regard court interpretation of a constitutional provision or statute, also not at issue here. See State ex rel. Rist v. Underwood, 524 S.E.2d 179 (W. Va. 1999) (interpreting article VI, section 15 of the West Virginia Constitution); Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB, 357 U.S. 93, 100 (1958) (interpreting the Taft-Hartley Act). None of these cases stand for the proposition advanced by the Department–that a circuit court does not have authority to enforce statutory duties on a state agency that is violating the law.

legislative branch are followed.

Second, the Department alleges that the court has "undertaken the legislative function of instructing the [Department] how to manage the behavioral health care system." (Mem. in Supp. of Pet. for Writ of Prohibition 19.) This assertion is also false. The court has not instructed the Department on the management of the health care system. Instead, the court allowed the parties to reach a mutually agreeable solution to the Department's statutory violation through mediation. The Department, not the court, constructed a plan to deliver the necessary TBI services, and then agreed that this plan be adopted through a consent order. See Consent Order on Services to Individuals with Traumatic Brain Injuries, E.H. v. Matin, No. 81-MISC-585 (July 3, 2007) (Pet. for Writ of Prohibition, Ex. I). The Department then failed to comply with the time line that it established and that it agreed would be enforced through court order. The court's decision to hold an evidentiary hearing on the Department's compliance with the consent order, entered voluntarily, is well within the bounds of its authority. See Seal v. Gwinn, 191 S.E. 860, 862 (W. Va. 1937) (holding that court's entry of a consent order could not remove "the power, inherent in all courts, to see that its decrees and orders are enforced").[3]

Third, the Department seems to argue that the legislature has constructed a scheme for the provision of TBI services in West Virginia Code sections 16-42-1 to -7, and that the court's

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[3]To the extent that the Department argues that the agency can not undertake any action unless it is explicitly ordered to do so by the legislature, the Department is clearly wrong. The legislature granted authority to the board of health, an executive agency, to promulgate rules and regulations to protect the rights of patients as established in section 27-5-9. W. Va. Code § 27-5-9(g). It is the Department's obligation to undertake the necessary steps to comply with legislation and the regulations enacted pursuant to that legislation. If the Department fails to do so, the court has the power to enforce the rules, regulations, and legislation. See E.H. I, 168 W. Va. 248. Under the Department's view, this system of government would not exist and the legislature would be required to enact legislation governing the minutae of everyday provision of services; this is simply not way the government operates.

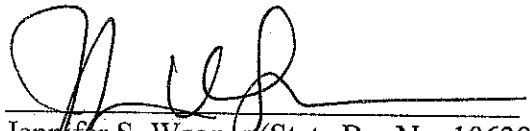
enforcement of the consent order would improperly conflict with this scheme. (Mem. in Supp. of Pet. for Writ of Prohibition 19-20.) West Virginia Code sections 16-42-1 to -7 created the Comprehensive Behavioral Health Commission in 2006 for the purpose of "study[ing] the current system of behavioral health services offered within West Virginia, the financing of those services, and proposed changes to both." W. Va. Code § 16-42-2. The Commission ceases to exist on January 31, 2009, or upon completion of its final report. W. Va. Code § 16-42-7. This legislation, which creates a limited body to study West Virginia's behavioral health system, in no way limits or conflicts with the Department's duty–created by statute and by mutually agreed upon consent order–to provide appropriate services and treatment to TBI victims. The Department fails to explain how the creation of the Commission relieves the Department of its obligation to provide adequate behavioral health services under section 27-5-9. If the Department's argument were correct, the creation of the Commission would obviate the Department's entire mission and require it to stop providing any services while the Commission conducts its study. This cannot possibly be correct.

Thus, the circuit court has not "announced its intention to supersede the legislative prerogative by taking charge of the delivery of behavior health care services in West Virginia," as the Department claims. (Mem. in Supp. of Pet. for Writ of Prohibition 21.) The court has not interfered with any legislative enactment. Instead, the circuit court has attempted to honor a legislative enactment–section 27-5-9–by ordering a simple evidentiary hearing on whether the Department has failed to comply with its duties under statute and the consent order. The purpose of this hearing is simply to hear whether the Department has failed to comply with the legislature's commands, in keeping with the proper role of the courts. As a result, the court has not violated law or exceeded its authority and a Writ of Prohibition can not issue.

III. CONCLUSION

The Department has failed to satisfy the standard for granting a writ of prohibition, and accordingly an order to show cause should not issue. The Department challenges the circuit court's order for an evidentiary hearing on overcrowding at Bateman Hospital and the Department's failure to provide promised TBI services. The Department has not shown that the order clearly violates the law; instead, the order is consistent with this Court's grant of authority and with the role of the court to interpret and apply the laws. The Department wishes to avoid reopening this matter, despite its dismal failure to provide necessary services and adequate facilities to individuals with severe mental health problems, in continued violation of section 27-5-9 of the West Virginia Code. The Department's violations are properly and efficiently addressed through the circuit court's order, which Respondents respectfully request that this Court allow to proceed.

E.H., et al.,
By Counsel.



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